Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

ABEL RIZO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX 1 TO PETITION FOR CERTIORARI REVIEW

On Petition for Certiorari to the United States Court of Appeals for the Eleventh Circuit

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR ABEL RIZO
2222 PONCE DE LEON BLVD, SUITE 500
CORAL GABLES, FLORIDA 33134
TELEPHONE: (305) 444-1400

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing was mailed *via* U.S. Mail, this 10th day of November, 2001, to: ***Solicitor General,*** Department of Justice, 10th and Constitution Avenue, N.W., Washington, D.C. 20530; and ***Madeleine R. Shirley, Esq.,*** Assistant U. S. Attorney, Chief-Appellate Division, Office of the U. S. Attorney, 99 N.E. Fourth Street, Miami, Florida 33132.

Rhonda A. Anderson, Esq.
Rhonda A. Anderson, P.A.
Counsel for *Abel Rizo*
2222 Ponce De Leon Blvd.
Suite 500
Coral Gables, Florida 33134
Florida Bar No. 708038
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 96-0075 CR-HIGHSMITH
MAGISTRATE JUDGE JOHNSON
21 USC §841(a)(1)
21 USC §846
18 USC §1951
18 USC §924(c)
18 USC §2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EVELIO RIZO, SR., a/k/a Jorge Perera,
EVELIO RIZO, JR., a/k/a "Evelito"
ABEL RIZO,
MARTA RIZO,
GUSTAVO VENTA, a/k/a "Chino",
LEONARDO CUELLAR, a/k/a "Leo",
LORENZO LOPEZ, a/k/a "Loren",
JJUAN CARLOS PELEGRINO,
ALEXANDER PENA, a/k/a "Boriqua",
CEASAR MARRERO, a/k/a "The Mexican",
LAZARO GALLEGO, JR., a/k/a "Gamba",
FELIX GALLEGO, a/k/a "Ica",
JOSE ALBERTO ONTIVERO, a/k/a "Papito",
JERRY DEAN CRESPO,
and
BARBARA FARIAS, a/k/a "Barbarita,"
Defendants.
_____/

SUPERSEDING INDICTMENT

The Grand Jury charges that:

COUNT I

From a date unknown to the Grand Jury, but at least from June 25, 1987 and continuing up to approximately March of 1995, at Dade County, in the Southern District of Florida, and elsewhere, the defendants,

EVELIO RIZO, SR.,
a/k/a Jorge Perera,
EVELIO RIZO, JR.,
a/k/a "Evelito"
ABEL RIZO,
MARTA RIZO,
GUSTAVO VENTA,
a/k/a "Chino",
LEONARDO CUELLAR,
a/k/a "Leo",
LORENZO LOPEZ,
a/k/a "Loren",
JJUAN CARLOS PELEGRINO,
ALEXANDER PENA,
a/k/a "Boriqua",
CEASAR MARRERO,
a/k/a "The Mexican",
LAZARO GALLEGO, JR.,
a/k/a "Gamba",
FELIX GALLEGO,
a/k/a "Ica",
JOSE ALBERTO ONTIVERO,
a/k/a "Papito",
JERRY DEAN CRESPO,
and

BARBARA FARIAS,
a/k/a "Barbarita,"

did knowingly and intentionally combine, conspire, confederate and agree with each other and with persons known and unknown to the Grand Jury to possess with intent to distribute and to distribute a Schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1); and Title 18, United States Code, Section 2.

A. OBJECT AND PURPOSE

It was the purpose and object of this conspiracy to reap hundreds of thousands of dollars in profits from a criminal enterprise involved in robbing and extorting drug traffickers.

B. MANNER AND MEANS

Among the manner and means used to achieve the unlawful objectives of the conspiracy were the following:

1. The leaders of the **RIZO** organization were **EVELIO RIZO, SR.**, and his two sons, **EVELIO RIZO, JR.** and **ABEL RIZO.**

2. **EVELIO RIZO, JR.** would obtain information from other co-conspirators identifying drug dealers.

3. Defendant, **EVELIO RIZO, JR.** would give money to other co-conspirators to purchase narcotics from these drug dealers while other co-conspirators followed the drug dealers to discover where the drug dealers went.

4. Defendant, **EVELIO RIZO, JR.** would recruit

and organize other members to kidnap or rob the drug dealers and force them to turn over cocaine and money.

5. On some occasions defendants **EVELIO RIZO, SR., EVELIO RIZO, JR.** and **ABEL RIZO** and other members of the organization would commit armed "home invasion" robberies to obtain cocaine and money.

6. Defendants **EVELIO RIZO, SR., MARTA RIZO, EVELIO RIZO, JR.** and **ABEL RIZO** would utilize the family residence located at 890 E.23rd Street, Hialeah, Dade County, Florida, to plan the robberies and to store the proceeds.

C. OVERT ACTS

In furtherance of the conspiracy described herein, the defendants committed one or more of the following overt acts, among others, in the Southern District of Florida and elsewhere:

1. On or about June 25, 1987, defendant, **EVELIO RIZO, SR.** drove a car in Salem County, New Jersey, containing ten (10)packages of cocaine wrapped in duct tape.

2. On or about May 7, 1988, defendant **LAZARO GALLEGO, JR.** provided information to **EVELIO RIZO, JR.** and others about the drug dealing of Rafael Leiva, Sr.

3. On or about May 14, 1988, Jorge Luis Hernandez, Ramon Fernandez, Angel Diaz, Lazaro Hernandez and Sergio Valdes attempted to force their way into Rafael Leiva Sr.'s house armed with handguns.

4. On or about May 14, 1988, Rafael Leiva, Sr.

was shot by Jorge Luis Hernandez during the attempted forced entry.

5. On or about May 14, 1988, defendant **EVELIO RIZO, JR.** retrieved Jorge Luis Hernandez and Ramon Fernandez after they attempted to force their way into the house of Rafael Leiva, Sr.

6. On or about August 5, 1989, **EVELIO RIZO, JR.** and **JUAN CARLOS PELEGRINO** pulled over two United States Customs Service agents using a flashing green light.

7. On or about August 5, 1989, **EVELIO RIZO, JR.** and **JUAN CARLOS PELEGRINO** possessed three .38 caliber handguns, two handheld portable radios and numerous rounds of ammunition.

8. On or about December 10, 1990, **EVELIO RIZO, SR.** and **EVELIO RIZO, JR.,** together with Carlos Gustavo De la Teja and others parked outside a house located at 5211 Southwest 4th Street, Dade County, Florida, and waited for the occupants to come home.

9. On or about December 10, 1990, Carlos Gustavo De la Teja and others forced their way inside the house located 5211 Southwest 4th Street, Dade County, Florida, posing as police officers and armed with handguns.

10. On or about June 29, 1992, defendants **EVELIO RIZO, JR., ABEL RIZO,** and **JUAN CARLOS PELEGRINO,** together with Miguel Tapia, Barbaro Vasquez, and Arnaldo Vivero, forced their way into an apartment located at 9330 Southwest 137th Avenue, Dade County, Florida, and removed

approximately two kilograms of cocaine.

11. In or about the end of July 1992, defendants, **EVELIO RIZO, JR., LEONARDO CUELLAR, BARBARA FARIAS** and **GUSTAVO VENTA** traveled from Miami, Florida to Puerto Rico to obtain twenty-five (25) kilograms of cocaine.

12. In or about the end of July 1992, Jorge Gonzalez delivered to defendants **EVELIO RIZO, SR., MARTA RIZO, ABEL RIZO,** and **EVELIO RIZO, JR.** approximately $300,000 in United States Currency that were the proceeds from the sale of the twenty-five (25) kilograms of cocaine referenced in paragraph 11 above.

13. On or about February 20, 1993, defendants **EVELIO RIZO, JR.** and **FELIX GALLEGO,** posing as police officers, forcibly entered a van in the area of 13194 Southwest 10th Lane, Dade County, Florida.

14. On or about February 20, 1993, defendants **EVELIO RIZO, JR., LEONARDO CUELLAR, FELIX GALLEGO** and **GUSTAVO VENTA** drove a van and its occupant to a farm in South Dade County against the occupant's will.

15. On or about February 20, 1993, defendants **EVELIO RIZO, JR., LEONARDO CUELLAR, FELIX GALLEGO** and **GUSTAVO VENTA** forcibly entered a house located at 13194 Southwest 10th Lane, Dade County, Florida, posing as police officers.

16. On or about February 20, 1993, defendants **EVELIO RIZO, JR., LEONARDO CUELLAR, FELIX GALLEGO** and **GUSTAVO VENTA** forced the occupant of a house located at 13194 Southwest 10th

Lane, Dade County, Florida, to the floor of her kitchen where they flexcuffed her hands and feet.

17. In or about late 1992 o early 1993, Rafael Leiva, Jr. delivered one (1) kilogram of cocaine to defendant, **LAZARO GALLEGO, JR.** at Awesome Gym, located in Hialeah, Florida.

18. In or about late 1992 or early 1993, Rafael Leiva, Jr. delivered two (2) kilograms of cocaine to defendant **LAZARO GALLEGO, JR.** at Awesome Gym, located in Hialeah, Florida.

19. In or about late 1992 or early 1993, defendants **LAZARO GALLEGO, JR.** and **EVELIO RIZO, JR.** forcibly removed five (5) kilograms of cocaine from the custody of Rafael Leiva, Jr. at gun point.

20. On or about April 30, 1993, defendants **EVELIO RIZO, JR., ABEL RIZO, LAZARO GALLEGO, JR., FELIX GALLEGO** and **LEONARDO CUELLAR** forced a car and its occupant off the road.

21. On or about April 30, 1993, defendants, **EVELIO RIZO, JR., ABEL RIZO,** and **LEONARDO CUELLAR** caused to be removed from a residence located at 7015 West 2nd lane, Hialeah, Florida, a safe and its contents.

22. On or about November 24, 1993, defendants **EVELIO RIZO, JR., ABEL RIZO,** and **LEONARDO CUELLAR** forcibly entered a house located at 11461 Southwest 32nd Lane, Dade County, Florida, posing as police officers and armed with handguns.

23. On or about November 24, 1993, defendants

EVELIO RIZO, SR., and **ALEXANDER PENA** remained outside watching for police while defendants **EVELIO RIZO, JR., ABEL RIZO,** and **LEONARDO CUELLAR** forcibly entered a house located at 11461 Southwest 32nd Lane, Dade County, Florida.

24. In or about the end of March 1994, Jaime Cruz delivered approximately fifteen (15) kilograms of cocaine to defendant **CESAR MARRERO.**

25. On or about October 5, 1994, defendants **EVELIO RIZO, JR., JUAN CARLOS PELEGRINO** and **LORENZO LOPEZ,** together with Jacinto Alvarez, forcibly removed Jose Correa-Herrera from his car and took him to a house in Hialeah, Florida.

26. On or about October 5, 1994, **EVELIO RIZO, JR.,** and Jacinto Alvarez caused Jose Correa-Herrera to have delivered to them ten (10) kilograms of cocaine.

27. On or about November 9, 1994, **EVELIO RIZO, SR., EVELIO RIZO, JR., JUAN CARLOS PELEGRINO, GUSTAVO VENTA, LORENZO LOPEZ** and **LEONARDO CUELLAR** stopped a car and its occupant in the area of 3505 Southwest 130th Avenue, Dade County, Florida, posing as police officers.

28. On or about November 9, 1994, **EVELIO RIZO, SR., EVELIO RIZO, JR., JUAN CARLOS PELEGRINO, GUSTAVO VENTA, LORENZO LOPEZ** and **LEONARDO CUELLAR** removed a suitcase containing more than $200,000 in United States Currency, that was the proceeds from the sale of

cocaine, from the car referenced in paragraph 27 above.

29. On or about November 25, 1994, defendant **JOSE ALBERTO ONTIVERO** provided information to defendant **EVELIO RIZO, JR.** about the drug dealing of Edilberto Rafael Fernandez.

30. On or about November 25, 1994, defendants **EVELIO RIZO, JR., LEONARDO CUELLAR** and **GUSTAVO VENTA,** forcibly entered the home of Edilberto Rafael Fernandez while armed with handguns

31. On or about October 26, 1994, Jacinto Alvarez traveled in a car from New York City, New York in possession of $169,040 in drug proceeds.

32. On or about December 19, 1994, defendant **LEONARDO CUELLAR** and Jacinto Alvarez traveled in a car from New York City, New York in possession of $88,520 in drug proceeds.

33. On or about December 31,1994, defendants **JUAN CARLOS PELEGRINO, GUSTAVO VENTA, LAZARO GALLEGO, JR.** and **JERRY DEAN CRESPO** removed three hundred and twenty six (326) kilograms of cocaine from a house in Dade County, Florida.

34. On or about December 31, 1994, Jacinto Alvarez delivered several kilograms of cocaine to defendant **JOSE ALBERTO ONTIVERO**.

35. On or about December 31, 1994, Jacinto Alvarez delivered several kilograms of cocaine to **BARBARA FARIAS**.

36. On or about December 31, 1994, defendants **LAZARO GALLEGO, JR.** and **JERRY DEAN CRESPO** delivered approximately thirteen (13)

kilograms of cocaine to defendant **JOSE ALBERTO ONTIVERO**.

37. On or about December 31, 1994, Carlos Gustavo De La Teja delivered approximately thirteen (13) kilograms of cocaine to defendant **JOSE ALBERTO ONTIVERO**.

38. On or about January 4, 1995, defendant **CESAR MARRERO** possessed one (1) kilogram of cocaine.

All violations of Title 21, United States Code, Section 846.

COUNT II

On or about June 29, 1992, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, JR.,
a/k/a "Evelito"
ABEL RIZO,
and
JUAN CARLOS PELEGRINO,

did knowingly and intentionally possess with intent to distribute a Schedule II controlled substance containing a detectable amount of cocaine; in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT III

On or about June 29, 1992, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, JR.,
a/k/a "Evelito"
ABEL RIZO,

and

JUAN CARLOS PELEGRINO,

did knowingly and willfully obstruct, delay and affect commerce, and the movement of any article and commodity in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendants did unlawfully take and obtain personal property, that is, cocaine, from the presence and custody of other persons located at 9330 Southwest 137th Avenue, Dade County, Florida, against their will, by means of actual and threatened force and violence to their person; in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT IV

On or about June 29, 1992, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, JR.,

a/k/a "Evelito"

ABEL RIZO,

and

JUAN CARLOS PELEGRINO,

did knowingly use and carry a firearm, that is, a handgun, during and in relation to a crime of violence and a drug trafficking crime which is a felony prosecutable in a court of the United States, that is, a violation of Title 18, United States Code, Section 19519a) as set forth in Count Three of this Indictment and a violation of Title 21, United States Code, Section 841(a)(1), as set forth in Count Two of this Indictment;

all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT V

On or about February 20, 1993, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, SR.
a/k/a Jorge Perera,
EVELIO RIZO, JR.,
a/k/a "Evelito"
GUSTAVO VENTA,
a/k/a "Chino",
LEONARDO CUELLAR,
a/k/a "Leo",
and
FELIX GALLEGO,
a/k/a "Ica",

did knowingly and willfully attempt to obstruct, delay and affect commerce, and the movement of any article and commodity in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendants did unlawfully attempt to take and obtain personal property, that is, cocaine, from the presence and custody of other persons located at 13194 Southwest 10th Lane, Dade County, Florida, against their will, by means of actual and threatened force and violence to their persons in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT VII

In or about late 1992 or early 1993, the exact date

being unknown to the Grand Jury, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, JR.,
a/k/a "Evelito"
and
LAZARO GALLEGO, JR.
a/k/a "Gamba",

did knowingly and willfully obstruct, delay and affect commerce, and the movement of any article and commodity in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendants did unlawfully attempt to take and obtain personal property, that is, cocaine, from the person, presence and custody of Rafael Leiva, Jr., against his will, by means of actual and threatened force and violence to his person; in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT VIII

On or about April 30, 1993, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, SR.
a/k/a Jorge Perera,
EVELIO RIZO, JR.,
a/k/a "Evelito"
ABEL RIZO,
LEONARDO CUELLAR,
a/k/a "Leo",
LAZARO GALLEGO, JR.
a/k/a "Gamba"

and

FELIX GALLEGO,

a/k/a "Ica",

did knowingly and willfully attempt to obstruct, delay and affect commerce, and the movement of any article and commodity in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendants did unlawfully attempt to take and obtain personal property, that is, cocaine, from the presence and custody of other persons located at 7015 West 2nd Lane, Hialeah, Dade County, Florida, against their will, by means of actual and threatened force and violence to their person; in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT IX

On or about November 24, 1993, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, SR.

a/k/a Jorge Perera,

EVELIO RIZO, JR.,

a/k/a "Evelito"

ABEL RIZO,

LEONARDO CUELLAR,

a/k/a "Leo",

and

ALEXANDR PENA

a/k/a "Boriqua",

did knowingly and willfully attempt to obstruct, delay and affect commerce, and the movement of any article

and commodity in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendants did unlawfully attempt to take and obtain personal property, that is, cocaine, from the person, presence and custody of other persons located at 11461 Southwest 32nd Lane, Dade County, Florida, against their will, by means of actual and threatened force and violence to their person; in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT X

On or about November 24, 1993, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, SR.
a/k/a Jorge Perera,
EVELIO RIZO, JR.,
a/k/a "Evelito"
ABEL RIZO,
LEONARDO CUELLAR,
a/k/a "Leo",
and
ALEXANDR PENA
a/k/a "Boriqua",

did knowingly use and carry a firearm, that is, a handgun, during and in relation to a crime of violence and a drug trafficking crime which is a felony prosecutable in a court of the United States, that is, a violation of Title 18, United States Code, Section 1951(a) as set forth in Count Nine of this Indictment and a violation of Title 21, United States Code, Section

846, as set forth in Count One of this Indictment; all in violation of Title 18, United States Code, Sections 924(c) and 2.

COUNT XI

On or about the end of March 1994, the exact date being unknown to the Grand Jury, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, SR.
a/k/a Jorge Perera,
EVELIO RIZO, JR.,
a/k/a "Evelito"
and
CESAR MARRERO,

did knowingly and intentionally possess with intent to distribute a schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT XIV

On or about November 4, 1994, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, SR.
a/k/a Jorge Perera,
EVELIO RIZO, JR.,
a/k/a "Evelito"
LEONARDO CUELLAR,
a/k/a "Leo",
GUSTAVO VENTA, a/k/a "Chino",

LORENZO LOPEZ,
a/k/a "Loren"
and
JUAN CARLOS PELEGRINO,

did knowingly and willfully attempt to obstruct, delay and affect commerce, and the movement of any article and commodity in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18, United States Code, Section 1951(b), in that the defendants did unlawfully attempt to take and obtain personal property, that is, United States Currency, which was the proceeds from the sale of cocaine, from the presence and custody of another person located at 3505 Southwest 130th Avenue, Dade County, Florida, against his will, by means of actual and threatened force and violence to his person; in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT XV

On or about November 25, 1994, at Miami, Dade County, in the Southern District of Florida, the defendants,

EVELIO RIZO, JR., a/k/a "Evelito",
GUSTAVO VENTA, a/k/a "Chino",
and
LEONARDO CUELLAR,
a/k/a "Leo",

did knowingly and willfully attempt to obstruct, delay and affect commerce, and the movement of any article and commodity in commerce, by robbery, as the terms "commerce" and "robbery" are defined in Title 18,

United States Code, Section 1951(b), in that the defendants did unlawfully attempt to take and obtain personal property, that is, cocaine, from the person, presence and custody of Edilberto Rafael Fernandez, against his will, by means of actual and threatened force and violence to their person; in violation of Title 18, United States Code, Sections 1951(a) and 2.

COUNT XVI

On or about December 31, 1994, at Miami, Dade County, in the Southern District of Florida, the defendants,

GUSTAVO VENTA, a/k/a "Chino",
JUAN CARLOS PELEGRINO,
LAZARO GALLEGO, JR., a/k/a "Gamba"
and
JERRY DEAN CRESPO,

did knowingly and intentionally possess with intent to distribute a schedule II controlled substance, that is, a mixture and substance containing a detectable amount of cocaine, in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

_____
FOREPERSON

_____
WILLIAM A. KEEFER
UNITED STATE ATTORNEY

_____
RUSSELL R. KILLINGER
ASSISTANT UNITED STATE ATTORNEY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 96-75-CR-HIGHSMITH

UNITED STATES OF AMERICA,
v.
ABEL RIZO,
Reg. 15622-004
Defendant.

JUDGMENT IN A CRIMINAL CASE
(For offenses Committed On or After November 1, 1987)

The defendant, ABEL RIZO, was represented by Rhonda A. Anderson. The government was represented by AUSA Russell Killinger.

The defendant was found guilty on count(s) 1-4, 8-10 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count)s), involving the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count No.(s)
21:§841 (a) & 846, 18:2	Conspiracy to PWID cocaine	3/95	1
21:841(a)(1), 18:2	PWID cocaine	6/29/92	2
18:1951(a) & 2	Interference with Commerce by threats or violence	11/24/93	3,8 & 9
18:924(c) & 2	Use and carry firearm during		

and in relation to a crime of violence and drug trafficking crime	11/24/93	4&10

As pronounced on August 22, 1997, the defendant is sentenced as provided in pages 2 through 3 of this Judgment. The sentence is imposed pursuant to the Sentencing reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $350.00, for count(s) 1-4, 8-10, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Signed this the 25th day of August, 1997.

_____

United States District Judge

Defendant's Social Security No.: 591-26-0917
Defendant's Date of Birth: 8/20/71
Defendant's Address: FDC, Miami

Defendant: **RIZO, ABEL**
Case Number: **96-75-CR-HIGHSMITH**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 468 months. This term consists of 168 months on each of counts 1 and 2 and 60 months on each of counts 3, 8 and 9 which all such terms to be served concurrently; 60 months on count 4 and 240 months on count 10. The terms of imprisonment imposed on each of counts 4 and 10 are to run consecutively to each other and consecutive to the concurrent sentences imposed on counts 1, 2, 3, 8 and 9.

The court makes the following recommendations to the Bureau of prisons: A facility in the southeast region, preferably, in the State of Florida.

The defendant is remanded to the custody of the United States Marshal.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to _____ at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By_____

Deputy U.S. Marshal

Defendant: **RIZO, ABEL**
Case Number: **96-75-CR-HIGHSMITH**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years on each of counts 1 and 2, and 3 years on each of counts 3, 4, 8, 9 and 10, all such terms to run concurrently.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.
2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.
3. The defendant shall not own or possess a firearm or destructive device.

4. The defendant shall submit to a search of his person and/or property to be conducted in a reasonable manner and at a reasonable time by the probation officer.
5. The defendant shall maintain full-time, legitimate employment and is not be unemployed for a term of more than 30 days unless excused by the probation officer.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the prob. officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where

controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the prob. officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5293
Non-Argument Calendar

D.C. Docket No. 96-75-Cr-Highsmith

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

Felix GALLEGO, a.k.a. Ica,
Evelio Rizo Sr., Lazaro Gallego Jr.,
a.k.a. Gamba, Abel Rizo,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(April 13, 2001)

Before TJOFLAT, HILL and POLITZ*, Circuit Judges.

*Honorable Henry A. Politz, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

TJOFLAT, Circuit Judge:

This case is an appeal by members of a drug conspiracy. Although the appellants raise a host of issues on appeal,[1] the only claim that merits discussion are that their sentences violate Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). We affirm the convictions and sentences.

I.

Four appellants are before us in the instant appeal: Felix Gallego ("Felix"), Lazaro Gallego Jr. ("Lazaro"), Abel Rizo ("Abel"), and Evelio Rizo Sr. ("Rizo Sr.").[2] The appellants were indicted by a Southern District of Florida grand jury on October 9, 1996, on charges of conspiracy, possession of cocaine, robbery, and firearms violations.[3] The indictment was sealed by order of the

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[1]We grant Evelio Rizo Sr.'s Motion to Adopt Issues of Co- Appellants, filed August 16, 1999.

[2]Felix and Lazaro are brothers. Abel is the son of Rizo Sr.

[3] The October 9 indictment was a second superseding indictment. The first indictment was handed down on January 24, 1996, and a superseding indictment followed on May 31, 1996. None of the appellants was charged in the first indictment, and, of the appellants, only Abel and Rizo Sr. were charged in the first superseding indictment.

We refer to the second superseding indictment throughout simply as "the indictment." This second superseding indictment charged fifteen individuals in seventeen counts. It charged the appellants as follows:

Count One--Conspiracy to possess cocaine, with intent to distribute, from June 25, 1987 to March 1995, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, all in violation of 21 U.S.C. § 846 (Abel, Felix, Lazaro, and Rizo Sr.);

Count Two--Possession of cocaine, with intent to distribute, on June 29, 1992, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Abel);

Count Three--Obstruction or delay of commerce by robbery ("Hobbs Act robbery") on June 29, 1992, in violation of 18 U.S.C. §§ 1951(a) and 2 (Abel);

Count Four--Using and carrying a firearm during the commission of a crime of violence and drug trafficking crime on June 29, 1992, in violation of 18 U.S.C. §§ 924(c) and 2 (Abel);

Count Five--Attempted Hobbs Act robbery on February 20, 1993, in violation of 18 U.S.C. §§ 1951(a) and 2 (Felix and Rizo Sr.);

Count Six--Using and carrying a firearm during the commission of a crime of violence and drug trafficking crime on February 20, 1993, in violation of 18 U.S.C. §§ 924(c) and 2 (Felix and Rizo Sr.);

Count Seven--Hobbs Act robbery in late 1992 or early 1993, in violation of 18 U.S.C. §§ 1951(a) and 2 (Lazaro);

Count Eight--Attempted Hobbs Act robbery on April 30,

court.

The appellants were allegedly members of a group, comprised of more than fifteen individuals, that carried out home invasions and robberies to obtain money, drugs, and other valuable items from persons believed to be drug traffickers. Such robberies are generally

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1993, in violation of 18 U.S.C. §§ 1951(a) and 2 (Abel, Felix, Lazaro, and Rizo Sr.);

Count Nine--Attempted Hobbs Act robbery on November 24, 1993, in violation of 18 U.S.C. §§ 1951(a) and 2 (Abel and Rizo Sr.);

Count Ten--Using and carrying a firearm during the commission of a crime of violence and drug trafficking crime on November 24, 1993, in violation of 18 U.S.C. §§ 924(c) and 2 (Abel and Rizo Sr.);

Count Eleven--Possession of cocaine, with intent to distribute, in March 1994, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Rizo Sr.); Count Fourteen--Hobbs Act robbery on November 9, 1994, in violation of 18 U.S.C. §§ 1951(a) and 2 (Rizo Sr.);

Count Sixteen--Possession of cocaine, with intent to distribute, on December 31, 1994, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2 (Lazaro).

Because the other eleven individuals named in the indictment are not before us, we address neither those individuals nor any counts of the indictment charging only those individuals.

known as "rip-offs." The usual *modus operandi* was for a member of the group (the "santo") to obtain information about other individuals who sold narcotics. (The santo would receive a larger portion of the robbery proceeds for his role in the offense.) The santo would report the information to Rizo Sr. and his son Evelio Rizo Jr. ("Evelito"). Next, the santo would make a couple of small, controlled drug purchases from the targeted victim while other members were conducting surveillance to obtain information about where the victim kept the drugs and drug proceeds (the "stash-house"). Once the stash-house was identified, members would conduct the rip-off by posing as police officers and forcibly robbing the victims by raiding the stash-house, often at gunpoint. Proceeds of the rip-off were taken back to the Rizos' home in Hialeah, Florida, where Evelito and Rizo Sr. would tally the robbery proceeds and distribute them to members of the group. If any member of the group was arrested, the group would post bond and hire counsel to ensure that the member would not cooperate with authorities and would not provide incriminating information about the group.

Abel and Rizo Sr. were arrested on June 3 and July 10, 1996, respectively, pursuant to the first superseding indictment. On November 15, 1996, they entered pleas of not guilty to the charges in the second superseding indictment. Felix was arrested on October 29, 1996, and Lazaro was arrested on November 6, 1996. They also pleaded not guilty. The four appellants went to

trial, along with two others.[4] A jury found the appellants guilty as charged (except Rizo Sr., who was acquitted on Count Eleven, a possession count). The district court subsequently dismissed Counts Six and Ten (firearms counts) against Rizo Sr., pursuant to Fed.R.Crim.P. 29.[5] The court denied all other motions by the appellants for acquittals or new trials. Thereafter, the court imposed the following sentences: Abel received 468 months' imprisonment, Felix received 324 months' imprisonment, and Lazaro and Rizo Sr. each received life imprisonment. Each appellant also was sentenced to five years' supervised

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[4]Jerry Dean Crespo and Leonardo Cuellar went to trial with the appellants. Crespo was convicted of Counts One and Sixteen; Cuellar was convicted of Counts One, Five, Six, Eight, Nine, Ten, Fourteen, and Fifteen (attempted Hobbs Act robbery on November 25, 1994). Crespo and Cuellar initially took appeals with the appellants, but subsequently dropped their appeals. Of the remaining nine members of the fifteen indicted conspirators, three entered guilty pleas before trial, two were arrested after the trial, and four (including Evelito) are fugitives.

[5]Rule 29 provides that the district court "shall order the entry of judgment of acquittal ... if the evidence is insufficient to sustain a conviction." Fed.R.Crim.P. 29(a). The court had reserved decision on Rizo Sr.'s motion for judgment of acquittal until after the jury verdict, pursuant to Fed.R.Crim.P. 29(b).

release.

II.

The appellants contend that their sentences violate Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). They did not raise timely constitutional objections on the Apprendi issues,[6] and we therefore review their Apprendi claims for plain error. *See* United States v. Candelario, 240 F.3d 1300, 1303-06 (11th Cir.2001). The four prongs of plain error review are: (1) there must be error; (2) the error must be plain; (3) the error must affect the appellant's substantial rights; and (4) the error must "seriously affect[ ] the fairness, integrity, or public reputation of judicial proceedings." Johnson v. United States, 520 U.S. 461, 467, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997); *see also* Fed.R.Crim.P. 52(b); United States v. Swatzie, 228 F.3d 1278, 1281 (11th Cir.2000). Before we may correct an error that was not timely raised, all four prongs must be satisfied. *See* Candelario, 240 F.3d at 1309.

A.

Abel received concurrent sentences of 168 months' imprisonment on Count One (conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846) and Count Two (possession of cocaine, with intent to

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[6]None of the four appellants raised a constitutional objection at or before sentencing based on the requirement that the jury must determine the quantity of drugs beyond a reasonable doubt. *See generally* United States v. Candelario, 240 F.3d 1300 (11th Cir.2001).

distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2). He also received concurrent terms of five years' supervised release on these counts.[7]

The Supreme Court established in Apprendi, 120 S.Ct. at 2362-63, that "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Applying Apprendi 's constitutional principle to drug cases proceeding under 21 U.S.C. § 841, we

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[7]Abel was sentenced at an offense level of 35 and a criminal history category of I. His sentences, when cumulated, mandated 468 months' imprisonment. In addition to the concurrent terms of 168 months' imprisonment for Counts One and Two, Abel received 60 months' imprisonment on each of Counts Three, Eight, and Nine; 60 months' imprisonment on Count Four; and 240 months' imprisonment on Count Ten. The sentences for Counts One, Two, Three, Eight, and Nine were to run concurrently; the sentences for Counts Four and Ten were to run consecutively to each other and consecutive to the concurrent sentences on the other counts. (Counts Four and Ten were firearm counts, which meant the sentences on those counts had to be imposed consecutively, pursuant to 18 U.S.C. § 924(c)(1)(D)(ii) and U.S.S.G. § 5G1.2.) Terms of three years' supervised release were imposed on each of Counts Three, Four, Eight, Nine, and Ten; all supervised release terms were to run concurrently.

have held that the quantity of drugs must be charged in the indictment and proven to a jury beyond a reasonable doubt if a defendant is to be sentenced under a penalty provision of 21 U.S.C. § 841 (such as section 841(b)(1)(A) or section 841(b)(1)(B)) that contains a quantity amount. United States v. Rogers, 228 F.3d 1318, 1327 (11th Cir.2000). If an indictment contains no allegation of drug quantity and the jury convicts but fails to make a quantity determination, a defendant is subject to the penalties prescribed in 21 U.S.C. § 841(b)(1)(C), which requires a sentence of not more than twenty years' imprisonment for possession of an unspecified quantity of cocaine.[8] Id. at 1327.

We have held, however, that "there is no error, plain

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[8]21 U.S.C. § 841(b)(1)(C) reads, in pertinent part:
In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years .... [and if] any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years....
Cocaine is a schedule II drug. 21 U.S.C. § 812, Schedule II. 21 U.S.C. § 841(b)(1)(A) provides a penalty of ten years to life imprisonment for possession of at least 5 kilograms of cocaine. 21 U.S.C. § 841(b)(1)(B) provides a penalty of five to forty years' imprisonment for possession of at least 500 grams, but less than 5 kilograms, of cocaine.

or otherwise, under Apprendi where the term of imprisonment is within the statutory maximum set forth in § 841(b)(1)(C) for a cocaine offense without regard to drug quantity." United States v. Gerrow, 232 F.3d 831, 834 (11th Cir.2000); *cf.* Candelario, 240 F.3d at 1306 ("[T]here is an error if the defendant's sentence exceeds the maximum sentence allowed by a statute without regard to quantity."). In the instant case, Abel's sentences of 168 months' imprisonment on Counts One and Two fall below the twenty year maximum prescribed by section 841(b)(1)(C). There is therefore no error under Apprendi.[9]

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[9]21 U.S.C. § 841(b)(1)(C) requires a supervised release term of "at least 3 years in addition to such term of imprisonment." Abel's sentences of five years' supervised release on Counts One and Two are not plain error. *See* Gerrow, 232 F.3d at 835 (holding that a term of more than three years' supervised release under 21 U.S.C. § 841(b)(1)(C) does not meet the "plain" requirement of plain error review, but declining to decide whether 18 U.S.C. § 3583 provides the maximum term of supervised release for a defendant sentenced under 21 U.S.C. § 841(b)(1)(C)); *see also* United States v. Pratt, 239 F.3d 640, 646-48 (4th Cir.2001) (holding that a sentence of five years' supervised release under 21 U.S.C. § 841(b)(1)(C) is not error at all, because section 841(b)(1)(C) provides for "at least 3 years" of supervised release and 18 U.S.C. § 3583 does not provide otherwise); United States v. Heckard, 238 F.3d 1222, 1236-37 (10th Cir.2001) (same); United States v.

B.

Count One of the indictment charged Felix with conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846. The jury convicted Felix and the district court sentenced him, pursuant to 21 U.S.C. § 841(b)(1)(A), to a term of 324 months' imprisonment and five years' supervised release on Count One.[10]

Felix satisfies the first two prongs of plain error review. His sentence of 324 months' imprisonment

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Aguayo-Delgado, 220 F.3d 926, 933 (8th Cir.2000) (same). *But see* United States v. Meshack, 225 F.3d 556, 578 (5th Cir.2000) (holding that 18 U.S.C. § 3583 limits a sentence of supervised release imposed under 21 U.S.C. § 841(b)(1)(C) to a term of three years).

[10]Felix was also sentenced to 240 months' imprisonment on Counts Five and Eight and 60 months imprisonment on Count Six. The terms of imprisonment were to be served concurrently on all except Count Six, which was a consecutive sentence. (Count Six was a firearm count, which meant that the sentence on that count had to be imposed consecutively, pursuant to 18 U.S.C. § 924(c)(1)(D)(ii) and U.S.S.G. § 5G1.2.) This meant that Felix's sentences combined to total 384 months' imprisonment. The district court sentenced Felix based on an offense level of 40 and a criminal history category of I. Supervised release terms of three years were set as to Counts Five, Six, and Eight. All supervised release terms were to run concurrently.

exceeds the maximum of twenty years' imprisonment prescribed by section 841(b)(1)(C). This error is plain. *See* Candelario, 240 F.3d at 1309 (holding that an Apprendi error in a drug case is plain on direct appeal).

Felix fails, however, to satisfy the third prong of plain error review because he is unable to carry his burden of demonstrating that the error affected his substantial rights. As he admitted in an objection to the Pre- Sentence Investigation Report ("PSI") and at the sentencing hearing, Felix personally possessed four kilograms of cocaine during a rip-off in October 1993.[11] Therefore, a minimum quantity of four kilograms was not in controversy. Four kilograms of cocaine exceeds the threshold amount necessary for sentencing under 21 U.S.C. § 841(b)(1)(B), which requires a finding of at least 500 grams of cocaine. Because section 841(b)(1)(B) prescribes a sentencing range of five to

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[11]At trial, Jorge Gonzalez (a co-conspirator who had pleaded guilty) testified that Felix was in actual possession of four kilograms of cocaine during this rip-off. He further testified that an additional fifty kilograms of cocaine were obtained during the rip-off. Felix only conceded possession of four kilograms of cocaine, and we therefore rely upon that number. (Felix stated in his objections to the PSI and at sentencing that his base offense level should be calculated on the basis of four kilograms of cocaine. The defense arrived at this amount because it was the lowest quantity that Felix was "alleged to have *personally* possessed" (emphasis added).)

forty years' imprisonment, and because Felix's sentence of 324 months' imprisonment is less than forty years, we find that Felix's substantial rights were not violated by the error in his sentencing.[12] *See* United States v. Pease, 240 F.3d 938, 944 (11th Cir.2001). We need not visit the fourth prong of plain error review since Felix has not satisfied the third prong. *See* Candelario, 240 F.3d at 1312.

C.

Lazaro was sentenced on Count One (conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846) and Count Sixteen (possession of cocaine, with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2) to concurrent life sentences.[13] Concurrent terms of five years' supervised release were also set for these counts.

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[12]21 U.S.C. § 841(b)(1)(B) requires a supervised release term of "at least 4 years in addition to such term of imprisonment." Felix's sentence of five years' supervised release on Count One is not plain error. *See* Gerrow, 232 F.3d at 835.

[13]Lazaro was also sentenced on Counts Seven and Eight to concurrent terms of 240 months' imprisonment; these sentences were to run concurrently with the life sentences on Counts One and Sixteen. Concurrent three year terms of supervised release were set as to Counts Seven and Eight. The district court sentenced Lazaro based on an offense level of 44 and a criminal history category of III.

Lazaro satisfies the first two prongs of plain error review. His sentences of life imprisonment exceed the maximum of twenty years' imprisonment prescribed by 21 U.S.C. § 841(b)(1)(C), and the error is plain.

Lazaro fails to satisfy the third prong of plain error review--his substantial rights were not affected. Count Sixteen was based on a rip-off that occurred on December 31, 1994. The only testimony at trial relating to an amount involved in the rip-off was that 326 kilograms of cocaine were obtained. Of these 326 kilograms, Lazaro personally received twenty-five kilograms for his active role in the rip-off[14]. Lazaro did not object to or contest this amount at trial, and he did not put on any contrary testimony (either at trial or at sentencing) as to a different amount.[15] Given the

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[14]This testimony came from Jorge Gonzalez. *See supra* note 11. Gonzalez testified that he was present during this rip-off and then testified as to the quantity involved. Additionally, Carlos Gustavo De La Teja (another co-conspirator who had pleaded guilty) testified for the prosecution that the amount was 325 kilograms, and that Lazaro received 25 kilograms as his share of the rip-off. He further testified that Lazaro and Jerry Dean Crespo (a co-defendant) sold him 14 kilograms that they had received from the rip-off.

[15] Lazaro did object to the attribution of 326 kilograms to him from the rip-off at issue, but he based his objection solely on the unreliability of the witnesses who testified as to drug quantity. He did not offer any contrary

undisputed testimony that 326 kilograms of cocaine were involved in Count Sixteen, we find that there was no way the jury could convict on Count Sixteen and yet determine that the quantity involved was less than five kilograms of cocaine. 21 U.S.C. § 841(b)(1)(A) authorizes a sentence of ten years to life imprisonment for possession of five kilograms or more of cocaine. Because the jury must have found at least five kilograms on Count Sixteen, Lazaro's substantial rights were not affected by a sentence of life imprisonment on Count Sixteen, pursuant to section 841(b)(1)(A). *See* United States v. Wims, 207 F.3d 661 (11th Cir.2001).

Neither were Lazaro's substantial rights affected by a sentence of life imprisonment on Count One (conspiracy). The jury's conviction on Count Sixteen necessarily subsumes the conviction on Count One for Apprendi review purposes, for the possession which constituted Count Sixteen was a part of the conspiracy.[16] Therefore, a finding of at least five

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testimony on quantity. Rather, Lazaro only put on alibi testimony by four defense witnesses (including Lazaro himself). The alibi was that Lazaro was at a New Year's Eve party the entire evening (from 6:00 P.M. to 2:00 A.M.), which would have rendered it impossible for him to be involved in the rip-off.

[16]Count Sixteen was listed as overt act number 33 in Count One of the indictment. Further, Count One alleged

kilograms on Count Sixteen suffices as a finding of at least five kilograms on Count One. Lazaro's substantial rights were thus not affected by a sentence of life imprisonment on Count One, pursuant to section 841(b)(1)(A).[17]

Because Lazaro fails to satisfy the third prong of plain error review, we need not visit the fourth prong.

D.

1.

Rizo Sr. was sentenced to a term of life imprisonment on Count One (conspiracy to possess and distribute cocaine, in violation of 21 U.S.C. § 846). The court also imposed a term of five years' supervised

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that on December 31, 1994, Lazaro (and others) possessed 326 kilograms of cocaine in the robbery as part of the conspiracy. Count One also alleged, as overt act number 36, that Lazaro and Jerry Dean Crespo delivered approximately 13 kilograms of cocaine to Carlos Gustavo De La Teja. *See supra* note 14.

[17]Because we find that sentencing under section 841(b)(1)(A) was proper, we hold that Lazaro's terms of five years' supervised release are proper. *See* 21 U.S.C. § 841(b)(1)(A) (requiring that the court impose "at least 5 years" of supervised release when a defendant possesses five or more kilograms of cocaine).

release for Count One.[18]

Rizo Sr. satisfies the first two prongs of plain error review. His sentence of life imprisonment exceeds the maximum of twenty years' imprisonment prescribed by 21 U.S.C. § 841(b)(1)(C). This error is plain.

Rizo Sr. fails, however, to satisfy the third prong of plain error review, for his substantial rights were not affected by the error. The indictment charged, as the first overt act in furtherance of the conspiracy, that Rizo Sr. drove a car "containing ten (10) packages of cocaine wrapped in duct tape" in Salem County, New Jersey on June 25, 1987. The ten packages each contained one kilogram of cocaine. Rizo Sr. pleaded guilty in New Jersey state court to possession of these ten kilograms of cocaine, which were confiscated in a traffic stop. Counsel for Rizo Sr. conceded at closing argument, "[The prosecutor] is right, there is no question but that [Rizo Sr.] had the ten kilograms of cocaine, he pled guilty to possessing the ten kilograms of cocaine." Because these ten kilograms of cocaine from the New

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[18]The district court also imposed sentences of 240 months' imprisonment on Counts Five, Eight, Nine, and Fourteen; all sentences were to run concurrently. Sentences of three years' supervised release were imposed on each of these other five counts; all supervised released terms were to run concurrently. Rizo Sr.'s offense level was 46 and his criminal history category was I.

Jersey conviction constituted part of the conspiracy charged in Count One, the jury necessarily found more than five kilograms of cocaine in connection with Count One. 21 U.S.C. § 841(b)(1)(A), which authorizes a sentence of ten years to life imprisonment, requires a finding of at least five kilograms of cocaine. Because the jury found that more than five kilograms of cocaine were involved in Count One, Rizo Sr.'s substantial rights were not affected by a sentence of life imprisonment.[19]

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[19]We would affirm Rizo Sr.'s sentence even if this ten kilogram quantity were not a part of the conspiracy. Although more than 150 kilograms of cocaine were attributed to Rizo Sr. at sentencing as part of the relevant conduct, none of the other counts for which he was convicted carried drug quantities as necessary components of the jury's verdict. Therefore, without the ten kilogram amount that we have deemed a necessary part of Count One, the district court could have properly sentenced Rizo Sr. to a maximum of only twenty years' imprisonment on Count One. However, this would not be grounds for reversal, notwithstanding the court's imposition of a life sentence, because the error would not have affected Rizo Sr.'s substantial rights. This is because, on remand, the district court would be obligated under the Sentencing Guidelines to sentence Rizo Sr. to a combined term of imprisonment that comports with his "total punishment." U.S.S.G. § 5G1.2 ("Sentencing on Multiple Counts of Conviction"). ("Total punishment" is the "combined length of the sentences," which is "determined by the adjusted combined offense level." U.S.S.G. § 5G1.2, Commentary.) If the maximum sentence for Count One was twenty years, consistent with 21 U.S.C. § 841(b)(1)(C), then

Because Rizo Sr.'s substantial rights were not affected by the error in his sentencing, we need not address the fourth prong of plain error review.[20]

2.

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the district court would have to fashion Rizo Sr.'s sentences consecutively (rather than concurrently) until it could produce a "combined sentence equal to the total punishment." U.S.S.G. § 5G1.2(d). Rizo Sr.'s offense level of 46 (and criminal history category of I) dictate mandatory life imprisonment, thereby requiring the district court to impose consecutive sentences sufficient to equal life imprisonment. Because consecutive sentences combining to equal life imprisonment are effectively the same as one sentence of life imprisonment (served with some lesser, concurrent sentences), Rizo Sr.'s substantial rights would not be affected if we affirmed the sentence on Count One. *See* United States v. Sturgis, 238 F.3d 956, 960-61 (8th Cir.2001) (holding that there was not plain error, notwithstanding Apprendi, in a sentence that exceeded the statutory maximum without regard to drug quantity due to a lack of "prejudice," since the district court, on remand, would have to impose the same "total punishment" through imposing consecutive sentences pursuant to U.S.S.G. § 5G1.2(d)); United States v. White, 238 F.3d 537, 543 (4th Cir.2001) (same); United States v. Page, 232 F.3d 536, 544-45 (6th Cir.2000) (same).

[20]Because we find that sentencing under section 841(b)(1)(A) was proper, Rizo Sr.'s term of five years' supervised release was also proper. *See supra* note 17.

Rizo Sr. also asserts that Apprendi requires the jury to determine whether he was a leader or organizer for purposes of sentencing. Because we have held that Apprendi does not apply to relevant conduct under the Guidelines, United States v. Maldenaldo Sanchez, 242 F.3d 1294, ---- (11th Cir.2001), we hold that there was no Apprendi error in the districtcourt's failure to require the jury to determine whether Rizo Sr. was a leader or organizer.[21] *See* United States v. Jackson, 240 F.3d 1245, 1249 (10th Cir.2001) (holding that Apprendi does not alter a district court's ability to adjust a defendant's offense level for role in the offense, pursuant to U.S.S.G. § 3B1.1); United States v. Caba, 241 F.3d 98, 101 (1st Cir.2001) (same).

III.

The appellants raise a number of other issues, all of which fail.[22] Because there was no error in the

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[21]We also reject Rizo Sr.'s contention that the district court improperly adjusted his offense level four levels for his role as a leader or organizer in the offense, pursuant to U.S.S.G. § 3B1.1(a). Given the overwhelming evidence of Rizo Sr.'s coordination of the rip-off scheme, the district court's determination that he was a leader or organizer was not clear error. *See* United States v. Rodriguez De Varon, 175 F.3d 930, 938 (11th Cir.1999) (en banc).

[22]The appellants waived the issue of the district court's need to recuse itself by failing to raise it at the first

appellants' convictions, and because any errors in their sentencing did not affect their substantial rights, the convictions and sentences are

AFFIRMED.

HILL, Circuit Judge, concurs in the result.

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available opportunity. *See* Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Florida, Inc., 140 F.3d 898, 913 (11th Cir.1998). Rizo Sr.'s contention that the district court failed to conduct an adequate McLain hearing (United States v. McLain, 823 F.2d 1457 (11th Cir.1987)) regarding his lawyer's continuing representation fails because Rizo Sr. validly waived his right to conflict- free counsel. The appellants' objections based upon the sufficiency of the evidence fail because the evidence was not insufficient as a matter of law and the evidence supported the convictions. The appellants' contentions that the district court abused its discretion in various evidentiary rulings at trial are meritless. Finally, there was no error in the Government's closing argument, particularly since the allegedly prejudicial references were merely rebuttal to inflammatory defense comments during closing.

CASE NO. 97-5293

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee/Plaintiff,
vs.
FELIX GALLEGO, LAZARO GALLEGO,
EVELIO RIZO, SR., and ABEL RIZO,
Appellants/Defendants.

On Appeal From The United States District Court
For The Southern District of Florida,
Miami Division, Criminal Division
Case No. 96-75-Cr-Highsmith

PETITION FOR REHEARING AND REHEARING *EN BANC* OF APPELLANT, ABEL RIZO

RHONDA A. ANDERSON, ESQ.
RHONDA A. ANDERSON, P.A.
COUNSEL FOR ABEL RIZO
2222 PONCE DE LEON BOULEVARD, SUITE 500
CORAL GABLES, FLORIDA 33134
Telephone: (305) 444-1400
Facsimile: (305) 444-1487

CERTIFICATE OF INTERESTED PERSONS

Undersigned counsel for the Appellant, ABEL RIZO, hereby certifies pursuant to Eleventh Circuit Rule 26-1.1 that the following is a complete list of persons and entities who have an interest in the outcome of this case:

Stuart Adelstein, Esq.,
Trial Counsel for Cesar Marrero

Adorno & Zeder, P.A.,
Trial Counsel for Co-Defendant Raphael Alujas

Maricio Aldazabal, Esq.,
Trial Counsel for Jerry Crespo

Thomas Alman, Jr., Esq.,
Trial Counsel for Jerry Crespo

Raphael Alujas, Co-Defendant

Jacinto Alvarez, Co-Defendant

Rhonda A. Anderson, Esq.,
Appellate Counsel for Abel Rizo

Lance Armstrong, Esq.,
Trial Counsel for Abel Rizo

Dennis Baer, Esq.,
Trial Counsel for Leonard Cuellar

Honorable Ted E. Banstra,
U. S. District Court Magistrate

Jose Batista, Esq.,
Trial Counsel for Evelio Rizo, Sr.

Donald Bierman, Esq.,
Trial Counsel for Jorge Gonzalez

Honorable Stephen T. Brown,
U. S. District Court Magistrate

Nathan Clark, Esq.,
Trial Counsel for Barbara Farias

Julio Codias, Esq.,
Trial Counsel for Lazaro Gallego, Jr.

Jerry Crespo, Co-Defendant

Jaime Cruz, Co-Defendant

Leonardo Cuellar, Co-Defendant

Carlos de la Teja,
Co-Defendant/Government Witness

Humberto Dominguez, Esq.,
Trial Counsel for Raphael Alujas

Honorable Robert L. Dubé,
U. S. District Court Magistrate

Barbara Farias, Co-Defendant

Ronald Gainor, Esq.,
Trial Counsel for Felix Gallego

Felix Gallego, Jr., Co-Defendant/Co-Appellant

Lazaro Gallego, Jr., Co-Defendant/Co-Appellant

Honorable Barry L. Garber,
U. S. District Court Magistrate

Stephen J. Golembe, Esq.,
Trial Counsel for Diego Palma

Jorge A. Gonzalez, Co-Defendant

Jason Grey, Esq.,
Trial Counsel for Leonard Cuellar

Honorable Shelby Highsmith,
U. S. District Court Judge

Honorable Linnea R. Johnson,
District Court Magistrate

Joel Kaplan, Esq.,
Trial Counsel for Jerry Crespo

Russell Killinger, Assistant United States Attorney

Patty Jean Kyle, Esq.,
Trial Counsel for Jose Ontivero

Jay Levine, Esq.,
Trial Counsel for Jacinto Alvarez

Cesar Marrero, Co-Defendant

Paul Morris, Esq.,
Appellate Counsel for Felix & Lazaro Gallego

Edward O'Donnell, Esq.,
Trial Counsel for Lazaro Gallego

Jose Ontivero, Co-Defendant

Honorable Peter R. Palmero,
U. S. District Court Magistrate

Diego Palma, Co-Defendant

Guillermo Pena, Co-Defendant

David Raben, Esq.,
Trial Counsel for Carlos De la Tejas

Abel Rizo, Defendant/Appellant

Evelio Rizo, Co-Defendant/Appellant

Richard Rosenbaum, Esq.,
Appellate Counsel for Evelio Rizo, Sr.

Michael Tarkoff, Esq.,
Trial Counsel for Evelio Rizo, Sr.

Honorable William C. Turnoff,
U. S. District Court Magistrate

Alphonso Saldana, Esq.,
Trial Counsel for Jerry Crespo

Fred Schwartz, Esq.,
Trial Counsel for Raphael Alujas

Madeline Shirley,
Assistant United States Attorney

Howard Sohn, Esq.,
Trial Counsel for Abel Rodriguez

Harris Sperber, Esq.,
Trial Counsel for Barbara Farias

United States of America, Appellee

Dennis Urbano, Esq.,
Trial Counsel for Gustavo Venta

Gustavo Venta, Co-Defendant

Jeffrey Weiner, Esq.,
Trial Counsel for Jaime Cruz

STATEMENT IN SUPPORT OF *EN BANC* CONSIDERATION

I express an belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court and that consideration by the fully court is necessary to secure and maintain uniformity of decisions in this Court with the United States Supreme Court. Additionally, I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

I. As to whether a Defendant who is charged with violating Title 21 U.S.C. § 841(a)(1) where the jury was *not* instructed to determine the quantity of drugs beyond a reasonable doubt, ***Apprendi*** applies if the defendant's sentence exceeds the maximum penalty under the United States Sentencing Guidelines for the lowest quantity of drugs under Sentencing Guidelines § 2D1.1?

A. ***Apprendi v. New Jersey***, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

B. ***Grosso v. United States***, 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968).

C. ***Jones v. United States***, 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999).

D. ***Marchetti v. United States***, 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968).

E. ***United States v. Candelario***,240 F.3d 1300 (11th Cir. 2001), *pet.cert.filed*,(May 4, 2001) (No.00-9956).

F. ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992).

II. As to whether the United States Sentencing Guidelines are statutes?

A. ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992).

III. As to whether plain error review applies where the law in support of the issue raised was not decided until after the Petitioner/Defendant's trial and sentencing?

A. ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968).

B. ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968).

C. ***United States v. Candelario,*** 240 F.3d 1300 (11th Cir. 2001), *pet.cert.filed,*(May 4, 2001) (No.00-9956).

RHONDA A. ANDERSON, ESQ.

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the type size and style in this brief is 14 point Times New Roman Scalable type.

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STATEMENT OF THE ISSUES

I

WHETHER *APPRENDI* APPLIES WHERE A DEFENDANT WHO IS CHARGED WITH VIOLATING TITLE 21 U.S.C. § 841(A)(1) AND THE JURY WAS *NOT* INSTRUCTED TO DETERMINE THE QUANTITY OF DRUGS BEYOND A REASONABLE DOUBT, IF THE DEFENDANT'S SENTENCE EXCEEDS THE MAXIMUM PENALTY UNDER THE UNITED STATES SENTENCING GUIDELINES FOR THE LOWEST QUANTITY OF DRUGS UNDER SENTENCING GUIDELINES § 2D1.1.?

II

WHETHER THIS COURT'S ANALYSIS OF THE *APPRENDI* CLAIMS HEREIN IMPROPERLY APPLIED A PLAIN ERROR STANDARD OF REVIEW, BECAUSE AT THE TIME THE *ABEL RIZO* WAS TRIED AND SENTENCED, NEITHER *APPRENDI* OR *JONES* WERE CONSIDERED OR DECIDED BY THE UNITED STATES SUPREME COURT, AND NO OTHER AUTHORITY IN THIS DISTRICT PROVIDED GROUNDS FOR SUCH RELIEF?

STATEMENT OF THE CASE

The trial in this cause was held in March and April, 1997 -- two years before the United States Supreme Court decided ***Jones v. United States,*** 526 U.S. 277, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), and three years before the Court's decision in ***Apprendi v. New Jersey,*** 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

The second Superseding Indictment upon which *Abel Rizo* was tried, failed to set forth any quantity of cocaine in Counts I or II. Count I charged *Abel Rizo* with conspiracy to possess with intent to distribute cocaine in violation of Title 21, U.S.C. § 846; in Count II charged him with possession with intent to distribute an unspecified quantity of cocaine in violation of Title 21 U.S.C. 841(a)(1). (R1-246). Additionally, at trial, the Government never requested a special jury verdict form for the jury to determine if it found beyond a reasonable doubt that either *Abel Rizo* participated in the uncharged acts, or the quantities of cocaine attributable to him. (R39).

Moreover, during trial, *Abel Rizo,* argued that he was not guilty of the offenses charged, and further argued that he did not have constructive possession of the cocaine involved in the charged and uncharged offenses. (R36-3476; R37-3619-3626).

This theme was repeated at sentencing with greater force. *Abel Rizo* submitted written objections to the PSI Report clearly stating that he was not responsible for the quantities of cocaine involved in both charged and uncharged acts, because he was not present and did

not participate in said offenses. (R3-557,625). At sentencing, however, the District Court only entertained evidence of whether *Abel Rizo* participated in two uncharged acts, to-wit: 25 kilograms involved in the alleged July 1992 cocaine rip-off involving cocaine from Puerto Rico, and nine (9) kilograms involved in the alleged Carmelo Robbery in Carol City in late March 1994. *See,* pages 10 through 15 of *Abel Rizo's* Initial Brief.

At the conclusion of the sentencing hearing, the District Court found that the preponderance of the evidence showed that the nine (9) kilograms were not attributable to *Abel Rizo,* but that the Government had produced a preponderance of evidence that the 25 kilograms in the Puerto Rico rip-off were attributable to *Abel Rizo.* (1SR4-80-81).

With regard to the 25 kilogram Puerto Rico cocaine rip-off, the following testimony was presented at sentencing:

Abel Rizo's grandfather testified regarding whether *Abel* was present at Mr. Velesquez' farm during the summer of 1992, rather than in Hialeah, Florida, where the Government's cooperating witness, Jorge Gonzalez claimed *Abel* was a participant in the Puerto Rico drug rip-off. (1SR4-15-16,19,23). Although due to the passage of time from 1992 to the time of his testimony in 1997, Mr. Velesquez could not account for every hour of every day in the month of July, 1992, Mr. Velesquez did recall that his grandson, *Abel Rizo,* lived on the farm with him in Homestead, Florida, and had his own room. Further, *Abel* helped at the farm by

trimming and caring for the 188 avocado trees on the farm in addition to the and hedges around the farm, and picking the avocados when they reached market size. (1SR4-17,22-24). Additionally, with regard to the summer of 1992, *Abel Rizo* testified that during a typical day at his grandfather's farm,

> My grandfather would make me up early or I would wake up because of the roosters. We had chickens and a lot of, you know, ducks. Every time in the morning they would get rowdy because they were hungry, so they would make noise. I would get up, get dressed, you know, wash up, and go outside. If the grass was too, you know, too long, cut it. If it was a lot of trees and a lot of leaves fell down or branches, take them out. If somebody wanted avocados I would go through the trees, start picking the big ones, and to sell them, especially early in the season, if you could have some of the avocados to sell, the price would be higher in the boxes. Then, you know, when the season starts going through the avocados price goes down.

(1SR4-55-56).

Although *Abel Rizo* freely acknowledged that he did leave the farm sometimes to see his girlfriend, -- he did so for no more than *three* hours, and did not see her

much, because "she wanted to get married, and I wasn't ready to get married. I was going to take a chance at football. And my coach from high school gave me that chance that year by introducing me to Coach Davis from Lambuth University . . . ." (1SR4-56).

Moreover, with regard to the alleged uncharged offenses in late March 1994, *Abel Rizo* testified that on March 13, 1994, he left Miami, Florida with his friends from Lambuth University[1] and drove straight through to Jackson, Tennessee where Lambuth University is located. (1SR4-64-65). During the previous week, *Abel* and his friends were on Spring Break from Lambuth University, and drove down to Key Largo, Florida, to go fishing. (1SR4-64-65). While *Abel* was in Key Largo, he bought an engagement ring for his fiancé, Juliana Meadows,[2] and had the date he planned to propose to her engraved inside, "3/14/94."[3] (1SR4-66-67). Thereafter, on March 31st, after finishing football practice, *Abel* and Juliana Rizo drove to Birmingham, Alabama. *Abel* and Juliana stayed overnight in a hotel, and the next morning, April 1, 1994, drove to her parents house in Hoover, Alabama. (1SR4-58-59). When *Abel* and Juliana arrived at the

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[1]Sven Oudirdorp from Holland, and Yokeem Solo from Finland. (1SR4-64-65).

[2]At the time of trial and sentencing, *Abel* and Juliana were married and Juliana's last name had changed to Rizo.

[3] Counsel proffered that Juliana Rizo had the ring available for the District Court to view the date 3/14/94. (1SR4-35).

Meadows' home, *Abel* asked her mother and father for Juliana's hand in marriage. (1SR4-59). *Abel* and Juliana spent the weekend with her parents and their friends. They went to DeSoto Caverns, and produced the dated tickets together with photographs and souvenirs from DeSoto Caverns. (1SR4-59-60; Sentencing/Def. Ex. 3-5). On Sunday, April 3, 1994, *Abel* and Juliana drove back to Lambuth University, because *Abel* had to be in school for football practice on Monday. (1SR4-59-60).

This testimony was corroborated through the proffered testimony of the witnesses who appeared to testify, but from whom the District Court did not permit testimony, and the following exhibits: Lambuth University transcripts from August 25, 1992 to April 24, 1996 (1SR4-70); Affidavit of Head Coach Vic Wallace,[4] Lambuth University Football Athletic Physical records[5] and football programs.[6]

Further, at the sentencing hearing on August 22,

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[4]Showing training schedule including March 14, 1994 through April 4, 1994, and *Abel Rizo's* presence at all training sessions, and weight during that period. (Sentencing/Def. Ex. 1).

[5]Showing that in August, 1992, *Abel Rizo* was 6'1" and weighed 250 pounds, and in August, 1993, his weight was 255 pounds. (Sentencing/Def. Ex. 2).

[6]Showing *Abel Rizo* played games on November 7, 1992 and November 13, 1992 and was listed as weighing 255 to 262 pounds. (Sentencing/Def. Ex. 6-7).

1997, the District Court prohibited *Abel Rizo* from submitting evidence to show that the drugs in the charged offenses should not be attributed to him.[7] Specifically, the Court did not permit him to submit *alibi* evidence that showed that he was not present, but was out of the State of Florida or at other locations.

However, at sentencing, *Abel Rizo* proffered the testimony of the witnesses available outside of the courtroom.[8] (1SR4-50-52). Those proffers together with the exhibits submitted, established an *alibi* such that *Abel Rizo* could not have participated in the offenses alleged in Counts I, II, III, IV, VIII, IX and X of the indictment.[9] Exhibits consisted of the following records from Lambuth University in Tennessee: medical records from the Athletic department and football programs showed that in 1992 *Abel Rizo* weighed 250 to 262 pounds, in 1993 weighed 255

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[7]While the District Court rulings were consistent with the law of this Circuit under a pre-***Jones*** and ***Apprendi*** analysis, that ruling denied the Appellant the right to challenge the quantities of drugs attributed to him at sentencing.

[8]Lambuth University Head Coach Vic Wallace, Lambuth University football players: Mark Gadwell, Sven Oudirdorp, and Yokeem Solo; Juliana Rizo's roommate, Kimberly Simmons; *Abel Rizo's* roommate, Eugene Poole; a neighbor from Hoover, Alabama: Viñes Turk; Juliana Rizo and her father, Joe Meadows. (1SR4-26-38,75).

[9]In addition to the proffers, the witnesses corroborated portions of the proffers in their allocution to the Court. (1SR4-86-96).

pounds, and in 1994 weighed 270 pounds. Thus, these records showed that the witnesses did not identify *Abel Rizo* as a participant in the aforementioned offenses, because *Abel Rizo* weighed 50 to 100 pounds more than the heaviest participant the victims described. (R13-153-54; R23-1411; R24-1640; R25-1687-90).

Although the District Court reduced the quantity of drugs attributable to *Abel Rizo* for the uncharged offenses, that reduction did not lower *Abel's* total offense level, and, accordingly, as a first offender, *Abel Rizo* received a total sentence of 468 months (39 years) incarceration, and 5 years supervised release. The total sentence consisted of 168 months on each Counts 1 and 2; 60 months each as to Counts 3, 8, and 9 to be served concurrently' an additional 60 months as to Count 4; and 240 months as to Count 10. (R4-633).

However, if the Court would have granted *Abel's* objection to the 25 kilograms cocaine alleged ripped off from Puerto Rico, *Abel Rizo's* base offense level under U.S.S.G. 2D1.1(a) would have been Level 28 (2 kg but less ban 3.5 kg). *See, Abel Rizo's* Supplemental Objections at p. 14. (R3-557,625-14).

ARGUMENT I

WHERE A DEFENDANT IS CHARGED WITH VIOLATING TITLE 21 U.S.C. § 841(A)(1) AND THE JURY WAS *NOT* INSTRUCTED TO DETERMINE THE QUANTITY OF DRUGS BEYOND A REASONABLE DOUBT, *APPRENDI* APPLIES IF THE DEFENDANT'S SENTENCE EXCEEDS THE MAXIMUM PENALTY UNDER THE UNITED STATES

SENTENCING GUIDELINES FOR THE LOWEST QUANTITY OF DRUGS UNDER SENTENCING GUIDELINES § 2D1.1.

On April 17, 2001, *Abel Rizo* sent to this Court a Notice of Supplemental Authority to his Supplemental Brief citing to ***United States v. R.L.C.,*** 503 U.S. 291, 112 S.Ct. 1329, 117 L.Ed.2d 559 (1992). *See, App. "A."* However, this Court's opinion in this cause did not consider that opinion or the argument that the Appellant should be resentenced at the lowest possible Sentencing Guidelines level due to the failure of the Government to plead and prove beyond a reasonable doubt the quantity of drugs attributable to *Abel Rizo*.

As set forth in the argument below, in ***R.L.C.*** the Supreme Court specifically rejected the Government's argument that ". . . the word "authorized" must mean the maximum term of imprisonment provided for by the statute defining the offense, since only Congress can "authorize" a term of imprisonment in punishment for a crime," *Id.* at 291, 112 S.Ct. at 1334, and held that the penalty provisions of the charging statute setting forth the maximum possible penalty are not to be given primacy over the maximum possible penalty permissible under the Sentencing Guidelines. ***R.L.C.,*** 503 U.S., at 298, 112 S.Ct., at 1334.

- **The Language in *Apprendi vs. New Jersey,* 530 U.S. 466 (2000) Providing That "Any Fact [Other than a Prior Conviction] That Increases the Penalty for a Crime Beyond the *Prescribed Statutory Maximum*" Refers to the Maximum**

Sentence Prescribed under the United States Sentencing Guidelines, Because as the Supreme Court Explained in *United States v. R.L.C.*, 503 U.S. 291 (1992), the Sentencing Guidelines Are Statutes:

The United States Sentencing Guidelines are clearly a creature of statute that impose upper and lower limits on a sentencing court. In ***R.L.C.***, the Supreme Court rejected the Government argument that the Guidelines are not statutes.

The district court in ***R.L.C.*** found that ***R.L.C.***, a juvenile, committed an act of juvenile delinquency within the meaning of 18 U.S.C. § 5031, because his acts would have been the crime of involuntary manslaughter in violation of 18 U.S.C. §§ 1112(a) and 1153 if committed by an adult. The maximum sentence for involuntary manslaughter under 18 U.S.C. § 1112(b) was three years. At ***R.L.C.'s*** dispositional hearing, the district court granted the Government's request to impose the maximum penalty for respondent's delinquency and accordingly committed him to official detention for three years.

Despite the manslaughter statute's provision for an adult sentence of that length, the United States Court of Appeals for the Eighth Circuit, vacated ***R.L.C.'s*** sentence and remanded for resentencing, after concluding that 36 months exceeded the cap imposed by 18 U.S.C. § 5037(c)(1)(B) upon the period of detention to which a juvenile delinquent may be sentenced. 915 F.2d 320 (1990).

The government filed a petition for certiorari review

to the Supreme Court, arguing -- as the Government has in most post-***Apprendi*** cases -- that the maximum penalty authorized under the statute refers to the charging statute; not the maximum under the Sentencing Guidelines. This Court rejected the Government's argument as follows:

> The Government suggests a straightforward enquiry into plain meaning to explain what is "authorized." It argues that the word "authorized" must mean the maximum term of imprisonment provided for by the statute defining the offense, since only Congress can "authorize" a term of imprisonment in punishment for a crime. As against the position that the Sentencing Guidelines now circumscribe a trial court's authority, the Government insists that our concern must be with the affirmative authority for imposing a sentence, which necessarily stems from statutory law. It maintains that in any event the Sentencing Commission's congressional authorization to establish sentencing guidelines does not create affirmative authority to set punishments for crime, and that the Guidelines do not purport to authorize the punishments to which they relate.
>
> ***But this is too easy. The answer to any suggestion that the statutory character of a specific penalty provision gives it primacy over administrative sentencing guidelines is that the mandate to apply the Guidelines is itself statutory. See 18 U.S.C. § 3553(b).*** More

significantly, ***the Government's argument that "authorization" refers only to what is affirmatively provided by penal statutes, without reference to the Sentencing Guidelines to be applied under statutory mandate, seems to us to beg the question.*** Of course it is true that no penalty would be "authorized" without a statute providing specifically for the penal consequences of defined criminal activity. The question, however, is whether Congress intended the courts to treat the upper limit of such a penalty as "authorized" even when proper application of a statutorily mandated Guideline in an adult case would bar imposition up to the limit, and an unwarranted upward departure [503 U.S. 298] from the proper Guideline range would be reversible error. § 3742. Here it suffices to say that the Government's construction is by no means plain. ***The text is at least equally consistent with treating "authorized" to refer to the result of applying all statutes with a required bearing on the sentencing decision, including not only those that empower the court to sentence but those that limit the legitimacy of its exercise of that power.*** This, indeed, is arguably the more natural construction.

R.L.C., 503 U.S. 291,298, 112 S.Ct. 1329, 1334. ***Mistretta v. United States,*** 488 U.S. 361, 109 S.Ct. 647,

102 L.Ed.2d 714 (1989).[10]

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[10] While ***Apprendi*** itself concerned only the New Jersey hate crime statute, there are numerous suggestions in the majority, concurring, and dissenting opinions that the case's scope may be quite broad indeed. Justice Thomas's concurrence argued that any fact that alters the range of punishments to which a defendant is exposed must be found by a jury, *see id.* at 2379-80, acknowledging that his proposed rule might invalidate the Sentencing Guidelines themselves. *See id.* at 2380 n. 11. Justice Scalia's concurrence maintained that "all the facts which must exist in order to subject the defendant to a legally prescribed punishment must be found by the jury." *Id.* at 2367. Justice O'Connor's dissent expressed concern that the Court's holding "will have the effect of invalidating significant sentencing reform accomplished over the past three decades." *Id.* at 2394. And Justice Breyer, a key figure in the development of the Sentencing Guidelines, lamented that "the rationale that underlies the Court's rule suggests a principle ... that, unless restricted, threatens the workability of every criminal justice system (if applied to judges) or threatens efforts to make those systems more uniform, hence more fair (if applied to [sentencing] commissions)." *Id.* at 2402.

The majority responded to these allegations simply by noting that "[t]he Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held. *See, e.g.*, ***Edwards v. United States***...." *Id.* [523 U.S. 511, 118 S.Ct. 1475] at 2366 n. 21. ***Edwards,*** the only case cited by the

As a result, this Court's holding in ***Apprendi,*** that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt," applies to the statutory maximums set forth in the United States Sentencing Guidelines if such are lower than the maximums set forth in the charging statute. 120 S.Ct. at 2362-63 (emphasis added).

Accordingly, the maximum possible sentence for the Petitioner under the Sentencing Guidelines would consist of a base offense level for each offenses calculated under Section 2D1.1 of the Sentencing Guidelines, or Level 12 with a sentencing range of 15 to 21 months.

ARGUMENT II

THIS COURT'S ANALYSIS OF THE *APPRENDI* CLAIMS HEREIN IMPROPERLY APPLIED A PLAIN ERROR

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majority, was quoted for the proposition that "a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines." 523 U.S. 511, 515, 118 S.Ct. 1475, 140 L.Ed.2d 703 (1998). The Court did not cite ***Mistretta v. United States,*** 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), the case that originally upheld the constitutionality of the Sentencing Guidelines, nor did it address the holding in ***R.L.C.,*** that the Sentencing Guidelines are a statute and that the statutory character of a specific penalty provision such as 21 U.S.C. § 841, does not give it primacy over administrative sentencing guidelines.

STANDARD OF REVIEW, BECAUSE AT THE TIME THE *ABEL RIZO* WAS TRIED AND SENTENCED, NEITHER *APPRENDI* OR *JONES* WERE CONSIDERED OR DECIDED BY THE UNITED STATES SUPREME COURT, AND NO OTHER AUTHORITY IN THIS DISTRICT PROVIDED GROUNDS FOR SUCH RELIEF.

Where an appellant raises an issue on appeal for the first time that was not available at the time of trial or sentencing, a plain error standard of review is inappropriate and denies the Appellant due process and equal protection under the law. *See,* ***Harris v. United States,*** 390 F.2d 616 (8th Cir. 1968), in which the Court reversed the defendant's conviction, even though the issue was only raised on direct appeal. In ***Harris,*** after oral argument, the Supreme Court decided ***Marchetti v. United States,*** 390 U.S. 39, 88 S.Ct. 697, 19 L.Ed.2d 889 (1968), and ***Grosso v. United States,*** 390 U.S. 62, 88 S.Ct. 709, 19 L.Ed.2d 902 (1968), in which the Court held that the wagering tax provisions of Title 26 U.S.C. may not be enforced by criminally punishing those individuals who have properly asserted their privilege against self-incrimination in defense of their noncomplicance with the provisions.

Harris was convicted of operating a lottery without paying the occupational tax imposed by 4411 of Title 26 U.S.C.A. In his appellate brief, Harris raised for the first time an assertion that criminal enforcement of the wagering tax statutes violates his right against self-incrimination.

Thus, like the case at bar, Harris failed to raise at trial an assertable defense, to-wit: his privilege against

self-incrimination. Similarly, *Abel Rizo* failed to raise a viable defense: the inadequacy of the indictment in addition to the insufficiency of the evidence to show beyond a reasonable doubt the quantity of drugs the Government attributed to him at sentencing.

In reversing Harris' conviction, the Eighth Circuit relied upon the Supreme Court's reasoning in ***Grosso,*** *supra.*[11] In ***Grosso,*** the Supreme Court felt the Appellant's failure to raise the issue below was understandable and did not constitute a waiver of his ability to assert constitutional right on direct appeal, because the appellant did not have the benefit if the Court's new decisions at trial. *Id.,* at 71.

Accordingly, this Court application of a plain error standard of review upon a defendant that did not have the benefit of the ***Jones*** or ***Apprendi*** decisions is improper.

CONCLUSION

Based on the foregoing reasons and authorities, and arguments of the Co-Appellants adopted herein, the

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[11]The Harris Court also noted that Title 28 U.S. C. § 2106 provides this Court with the authority to:

> affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it fore review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

390 F.2d at 617.

Appellant, *Abel Rizo*, respectfully requests that this be reversed, or alternatively, reversed and remanded for re-sentencing and/or a new trial.

Respectfully submitted,

RHONDA A. ANDERSON, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the foregoing Petition for Rehearing and Rehearing En Banc of Abel Rizo was mailed this 4th day of July, 2000, ***Madeline Shirley, Esq.,*** Assistant United States Attorney, Appellate Division, 99 N.E. Fourth Street, Miami, Florida 33132, ***Richard Rosenbaum, Esq.,*** *Counsel for Evelio Rizo, Sr.,* Suite 1500, One East Broward Boulevard, Fort Lauderdale, Florida 33301, and ***Paul Morris, Esq.,*** *Counsel for Felix Gallego and Lazaro Gallego,* 999 Ponce de Leon Boulevard, Suite 550, Coral Gables, Florida 33134.

RHONDA A. ANDERSON, P.A.

Rhonda A. Anderson, Esq.
2222 Ponce De Leon Blvd., Suite 500
Coral Gables, Florida 33134
Telephone: (305) 444-1400
Facsimile: (305) 444-1487
Florida Bar No: 708038

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5293-DD

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIX GALLEGO,a.k.a. Ica,
EVELIO RIZO, SR., LAZARO
GALLEGO, JR., a.k.a. Gamba,
ABEL RIZO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

August 3, 2001

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC.

Before:TJOFLAT, HILL and POLITZ*, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

*Honorable Henry A. Politz, U.S. Circuit Judge
for the Fifth Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-5293-D

District Court Docket No. 96-00075-CR-SH

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FELIX GALLEGO,a.k.a. Ica,
EVELIO RIZO, SR., LAZARO
GALLEGO, JR., a.k.a. Gamba,
ABEL RIZO,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion, included herein by reference, is entered as the judgment of this Court.

Entered: April 13, 2001
For the Court: Thomas K. Kahn, Clerk
By: McCombs, Elaine

ISSUED AS MANDATE: AUG. 13, 2001
U.S. COURT OF APPEALS
ATLANTA, GA